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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 vs.

14 KEVIN LUIS (43),

15 Defendant.

CASE NO. 10cr3044WQH

ORDER

HAYES, Judge:

16 The following motions filed by the Defendant Kevin Luis are pending: 1) the motion
17 to produce wiretaps, to produce and preserve discovery and suppress statements and evidence
18 (ECF No. 258); 2) the supplemental motion for discovery (ECF No. 1304); and 3) the motion
19 to dismiss the indictment and suppress evidence/statements (ECF No. 1372).

20 Motion to produce wiretaps, to produce and preserve discovery and suppress statements¹ and
21 evidence (ECF No. 258)

22 Defendant seeks discovery of his statements, reports relating to his arrest, and material
23 under *Brady v. Maryland*, 373 U.S. 83 (1963). Defendant further seeks an order directing the
24 Government to disclose the identity of CI-1. The Government states that the relevant
25 discovery and the identity of CI-1 was provided to Defendant Luis over a year and a half ago.

26 In the United States's Response to Defendant Motions filed on January 19, 2011, the
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28 ¹ Government stated in pleading filed on September 12, 2011 that "the Government does not intend to introduce Luis' post-arrest statements." (ECF No. 931 at 68).

1 Government stated:

2 On September 14, 2010, the Government produces approximately 99,117 pages
3 of written discovery and 193 DVDs to the defendants. This discovery was
4 provided to each defendant on a single (searchable) external hard drive. The
5 documents and DVDs include: (1) all conversations intercepted pursuant to
6 court-authorized wiretaps; (2) pleadings submitted to obtain court orders
7 authorizing electronic surveillance; (3) wiretap “line sheets,” which are
8 hyperlinked to the corresponding intercepted conversation(s); (4) a copy of each
9 defendant’s post-arrest statements’ (5) copies of all items seized during the
10 execution of search warrants; (6) orders authorizing the tracking of various
11 cellular phones; (7) photographs taken at the various search locations; (8) law
12 enforcement investigative reports; and (9) video and audio tapes of consensually
13 recorded conversations.”

14 ECF No. 553 at 2. The record shows that the identity of CI-1 was disclosed to Defendant Luis
15 in discovery relating to consensual audio/video recordings along with the line sheets from the
16 wiretaps more than a year and a half ago.² Based upon the record, the Court concludes that the
17 Government has complied with its discovery obligations.

18 The motion to produce wiretaps, to produce and preserve discovery and suppress
19 statements and evidence (ECF No. 258) is denied.

20 Supplemental motion for discovery (ECF No. 1304)

21 Defendant requests “any and all files concerning Defendant Kevin Luis, CI1, as well
22 as any co-defendants who may be used at trial against Mr. Luis.” (ECF No. 1304 at 3).
23 Defendant requests the records of all of CI-1's illegal conduct during the pendency of this case,
24 the prison records of CI-1, all recordings of the wire placed on CI-1 and his vehicle, the
25 substance abuse history of CI-1, and all polygraph results concerning CI-1, access to the phone
26 and computer of CI-1. Defendant requests the results of any fingerprints or DNA tests taken
27 on any of the items seized from his person or home, and all TECS records pertaining to his
28 entry to and from the United States into Mexico.

29 The Government asserts that it has complied with its obligations under Rule 16 of
30 Federal Rules of Criminal Procedure, *Brady*, *Giglio*, and *Jencks*. The Government has stated
31 that it does not intend to call CI-1 as a witness at trial and that the Defendant has not identified

32 ²While the Defendant Luis was not intercepted on any of the wiretaps or named in any
33 of the wiretap orders, the Government produced video and audio tapes of consensually
34 recorded conversations involving Defendant Luis.

1 further relevant discovery related to CI-1. The Government further states that Defendant's
2 computers and phones seized in this case have been available for review at the defense
3 counsel's convenience for the past year and one half.

4 In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that
5 "the suppression by the prosecution of evidence favorable to an accused upon request violated
6 due process where the evidence is material either to guilt or to punishment..." 373 U.S. at 87.
7 Evidence impeaching the testimony of a government witness falls within the *Brady* rule when
8 the reliability of the witness may be determinative of guilt or innocence. See *Giglio v. United*
9 *States*, 405 U.S. 150, 154 (1972); *United States v. Bagley*, 473 U.S. 667, 676 (1985); and
10 *Strickler v. Greene*, 527 U.S. 263, 280 (1999). The record shows that Government has
11 disclosed the identity of CI-1 and all recordings of the wire placed on CI-1 and his vehicle, and
12 that CI-1 was not subject to polygraph during the course of this investigation. The
13 Government will not call CI-1 as a witness at trial and has no obligation to provide
14 impeachment materials.³ On August 30, 2011, the Government made an early production of
15 potential *Jencks* material in the form of 78 CDs containing audio-recording of debriefs with
16 the Government's confidential informants. (ECF No. 1371 at 3). On January 24, 2012, the
17 record shows that the Government produced *Giglio* material in the form of plea agreements and
18 cooperation addendums of its cooperating witnesses. (ECF No. 1371 at 4). The record shows
19 the Government does not intend to use any TECS reports in its case-in-chief. Based upon the
20 record in this case, the Government has complied with its discovery obligations at this stage
21 in the proceedings.

22 Defendant's supplemental motion for discovery (ECF No. 1304) is denied.

23 Motion to dismiss the indictment and suppress evidence/statements (ECF No. 1372)

24 Defendant moves the Court to dismiss the indictment on the grounds that CI-1
25 committed criminal activity during the investigation of this case and "the Government has
26 hidden this material information." (ECF No. 1372 at 4). The Government states that "the CI-1
27 was arrested on July 13, 2010, just 9 days before the takedown in this case." (ECF No. 1452

28 ³ Defendant has been provided with the location of CI-1 as requested.

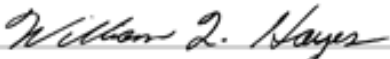
1 at 3).

2 Dismissal of an indictment is warranted where outrageous law enforcement conduct
3 violates due process. *United States v. Ross*, 372 F.3d 1097, 1107 (9th Cir. 2004). Even where
4 no due process violation exists, a federal court may dismiss an indictment pursuant to its
5 supervisory powers. *Bank of Nova Scotia v. United States*, 487 U.S. 255 (1988). To justify
6 exercise of the court's supervisory powers, prosecutorial misconduct must (1) be flagrant and
7 (2) cause substantial prejudice. *Ross*, 372 F.3d at 1110. The Court concludes that there are
8 no facts alleged by the Defendant which would show flagrant government misconduct or
9 prejudice to the Defendant. Defendant's motion to dismiss the indictment is denied.

10 Defendant asserts that any body wire recordings in this case should be suppressed on
11 the grounds that a warrant is required from a neutral judicial officer before an informant may
12 record a conversation. The Government asserts that no warrant is required because CI-1, one
13 of the participants in each of those conversations, consented to those recordings. There is no
14 warrant requirement for consensual recording of a conversations by an informant. *See United*
15 *States v. Clark*, 883 F.2d 662, 698 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 751 (1991).
16 Consensual recordings are not subject to the wiretap requirements in the Title III of the
17 Omnibus Crime Control and Safe Streets Act of 1968. *See* 18 U.S.C. Section 2511(2)(d).
18 Defendant's motion to suppress the body wire recordings is denied.

19 IT IS HEREBY ORDERED that 1) the motion to produce wiretaps, to produce and
20 preserve discovery and suppress statements and evidence (ECF No. 258) is denied; 2) the
21 supplemental motion for discovery (ECF No. 1304) is denied; and 3) the motion to dismiss the
22 indictment and suppress evidence/statements (ECF No. 1372) is denied.

23 DATED: February 10, 2012

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25 **WILLIAM Q. HAYES**
26 United States District Judge
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